5-3100-10205-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

John M. Guider,
Petitioner,

v.

City of Princeton,
Respondent

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel, Jr. on December 13, 1996 at the Office of Administrative Hearings in Minneapolis, Minnesota. The record closed on February 3, 1997, upon receipt of the last post-hearing filing.

Respondent, City of Princeton was represented by Carla Heyl, Esq., 145 University Avenue West, St. Paul, MN 55103-2044. Petitioner John M. Guider was represented by Robert A. Hill, Robert Hill & Associates, Ltd., Suite 2485, Centre Village Offices, 431 South Seventh Street, Minneapolis, MN 55415.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Proposed Findings of Fact and Conclusions of Law contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Bernie Melter, Department of Veteran's Affairs, Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155-2079 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Were Petitioner's veterans preference rights violated when he was removed from his position of employment and his duties assigned to non-veterans with less seniority?

2. If so, what damages are appropriate?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is an honorably discharged veteran who served in the United States Air Force from 1964 to 1968 during the Vietnam War.

2. Respondent is a statutory city, a local municipal unit of government.

3. Respondent's Policy Department hired Petitioner as a permanent part-time police officer in 1986. Petitioner's duties were to patrol the streets of Princeton and to respond to requests for police service.

4. Petitioner worked in this capacity for seven years, averaging between 9 and 19 hours per week. Petitioner's cumulative totals during his tenure as a part-time officer for Princeton were 2816.25 hours worked for $27,942.04 in net pay. Based on these figures, Petitioner averaged 402.32 hours/year and received $3,991.72/year in net pay, including Respondent's $329.76/year contribution to his Public Employee Retirement Account ("PERA"). See Respondent's Exhibits 1 and 15.

5. Petitioner planned to continue working as a part-time police officer for the City of Princeton into retirement from his current full-time position with the Metropolitan Transit Police. Petitioner had an explicit understanding with the police chief who hired him in 1986 that he would make himself available for weekends and special events in Princeton, even though it meant giving up much more lucrative part-time and overtime assignments connected with his full-time job. In return, when he retired, the Chief promised that Petitioner would be able to supplement his retirement income by continuing to work part-time in Princeton.

6. Petitioner worked regularly subsequent to his hiring in March of 1986, averaging 15 hours per week for the rest of that year.

7. One of the other officers was injured for much of 1987 and Petitioner was called upon to fill in more frequently averaging almost 17 hours per week that year.

8. During the first seven months of 1988, prior to the hiring of the new Chief Warneke on August 1, 1988, Petitioner worked nearly every week, averaging roughly nine hours per week.

9. After Chief Warneke was hired Petitioner was scheduled to work in only nine of the last twenty-two weeks of the year.

10. Petitioner's scheduled hours picked up somewhat in 1989, working an average of 13 hours per week for 36 weeks or roughly two-thirds of the time.

11. Chief Warneke thereafter decreased Petitioner's scheduled hours very significantly over the next three years to an average of less than ten hours per week for only twenty-six weeks a year.

12. Petitioner complained to the Chief about his declining hours, to no avail. The Chief also declined to give Petitioner any advanced notice of which weekends or special events he would be scheduled to cover, which jeopardized his ability to work elsewhere.

13. In 1993, Chief Warneke scheduled Petitioner to work only twenty-two weeks for an average of less than nine hours per week.

14. Another source of friction between the Chief and Petitioner was the Chief's increased utilization of police "reserve officers" at the same time that Petitioner's hours were being reduced. Although these volunteer civilian assistants were not trained or certified as qualified officers, they were used as "back-up" and provided other police services for community events and special occasions.

15. Petitioner was also upset at the favoritism the new Chief showed to these unqualified substitutes, who were increasingly used to eliminate his job. He was particularly dismayed when these "reserves" were given a uniform allowance and official jackets, which he was denied, even though the union bargaining agreement guaranteed him the same clothing allowance as full-time officers and an allowance had been budgeted for him by the city council. The Petitioner also took special offense when the Chief prohibited him from taking home a police radio, while allowing at least two reserves to possess one.

16. Petitioner felt the Chief was adding insult to injury by failing to assign these reserves to work with him as back-up, which he felt was a safety issue. In particular, for example, he had to work alone one Friday night -- prom night, while two officers and two reserves were scheduled for the following day when there were no special events in town.

17. Petitioner did not construe the cutback in hours, last minute scheduling and disparate treatment as attempts to make his working conditions so unpalatable that he would leave "voluntarily". The Chief did not tell him at any time prior to November of 1993 that his job was in jeopardy. Although Petitioner could have had up to twenty hours a week of regular and much more lucrative part-time and overtime employment in Minneapolis, he stuck to his bargain of staying available for work in Princeton, in anticipation of post-retirement continuation of that employment.

18. Petitioner did make Respondent aware of these grievances by calling them to the Chief's attention, to no avail. As a part-time employee, whose hours were completely dependent on the Chief's discretion, Petitioner was reluctant to antagonize the Chief. He consequently did not exercise his rights to file formal grievances or to appeal any of the matters to the city manager or council.

19. In November of 1993, Chief Warneke called Petitioner at home, asking him to come into his office, where he informed Petitioner that he was going to have to "let you go." Petitioner was not given the statutory notice at this point of his veterans preference rights, including the right to request a hearing on removals.

20. Petitioner was specifically told that his hours were being given to the department's latest new hiree, who was a considerably less qualified non-veteran. Although Petitioner was told that his position was being eliminated for "lack of funding",

there was no cut back in funding for the police department or in Respondent's police service hours provided annually to its citizens. The hours which Respondent had previously assigned to Petitioner were basically reallocated to the new hiree, at twice the cost per hour. The funding for the police department was increased by $19,000.00 the next year, to expand the city's total patrol hours, as they had been expanded regularly over the past eight years that Petitioner was employed part-time and as they would continue to be expanded over the next three years.

21. Petitioner was upset and went directly into the next room to discuss the matter with the city administrator who he considered to be a "friend". The administrator promised to look into it and get back to Petitioner "by Christmas".

22. Chief Warneke ceased scheduling any further part-time work for Petitioner that evening. He did not schedule Petitioner to work any further hours in 1993 or at any time since then. He also told the other officers in the department not to call Petitioner to substitute for them in the future when they were sick or in other emergencies, even though the costs of using full-time officers as substitutes in such circumstances doubled or tripled the city's costs.

23. Sometime in 1994, Petitioner's picture was removed from the wall where it had been displayed with the pictures of the other officers.

24. Petitioner continued to refuse part-time and overtime opportunities elsewhere in 1994 and 1995, so that he could "keep his weekends free" for continued employment with the City of Princeton, as he had in the past, in order to keep his work schedule free of any potential conflicts.

25. There was ample room for the Chief to schedule Petitioner to work part-time and avoid overtime for full-time officers under the union contract. "Full-time" was defined as "normally scheduled to work 30 or more hours each work week" and "part-time" was defined as "normally" scheduled for less than 30. The "normal work week" is "an average of forty (40) hours in any four (4) week period."

26. The "Budget Notes" submitted to Respondent's city council in 1994, 1995 and 1996 provided for a "standard uniform allowance" in each of those years of "$200.00 for new part-time, and $100.00 for current part-time."

27. The 1995 "Budget Notes" to the council described the recent increases in overtime pay ($2,560.00 actual in 1993 versus a budgeted $1,000.00 a 150% cost overrun) which coincided with the decrease in Petitioner's scheduled part-time hours that year, as being "predominately due to community special events."

28. One of the chief advantages of using Petitioner's part-time services was that he could be scheduled to cover such community special events, instead of scheduling overtime for full-time officers.

29. Respondent did not provide its own cost figures and did not dispute Petitioner's "bottom line" cost calculation that, when all benefits are included, it cost the city twice as much per hour to schedule a full-time officer instead of employing him to provide routine patrol services. That diseconomy increased by another 50% plus, whenever a full-time officer on overtime was scheduled to provide the service.

30. The city administrator did not get back to the Petitioner, as promised, by Christmas of 1993. In fact, neither the administrator nor the chief got back to the Petitioner at all until November of 1995, when the administrator called Petitioner, at the chief's behest, to request that Petitioner return his badge and other equipment.

31. Although that request ended any doubt as to whether Petitioner had been removed from his position of employment, he was not given notice at that point of his right to request a hearing on the termination under the Veterans Preference Act.

32. Thereafter, in November of 1995, Petitioner filed a formal petition with the Commissioner of Veterans Affairs alleging a violation of his veterans preference rights.

33. After investigating the petition, the commissioner concluded preliminarily that it appeared that Petitioner's rights had been violated, ordering a hearing on the petition on December 29, 1995.

34. Respondent's city council met in February of 1996 and voted to officially terminate Petitioner's employment as a part-time officer with the city, effective May 1, 1996. At this point Respondent gave the Petitioner the formal written notice provided for in the Veterans Preference Act of his right to a hearing on the removal.

35. Having a qualified police officer on call who was willing to work part-time hours when needed, gave Respondent's Police Chief more flexibility in scheduling regular full-time officers. It enhanced Respondent's ability to give the full-time officers weekends off and minimized the need for overtime when regular officers took vacations or got sick or had to work extra hours for paperwork or court appearances (which are paid at time and one-half under the collective bargaining agreement, if required during scheduled time off).

36. It is unclear on this record whether the Respondent has decided to forego utilization of such part-time assistance in the future. The record was held open to give Respondent an opportunity to submit a copy of its latest collective bargaining agreement, as evidence that part-time employment was being at least temporarily eliminated, but the documentation was not supplied.

37. Based upon the payroll data supplied by the Respondent in its Exhibit 1 (wages less PERA contributions averaged for 1987 through 1992) $300.00 per month is a fair calculation of the back pay that Petitioner would have received beginning in December of 1993.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Administrative Law Judge and the Commissioner of Veteran's Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. That the Notice of Hearing was in all respects proper with regard to form, content, execution and filing. All other substantive and procedural requirements of law and rule have been fulfilled.

3. That any of the foregoing Findings of Fact which are more properly designated as Conclusions are hereby adopted as such.

4. That Petitioner is an honorably discharged veteran entitled to the rights and benefits set forth in Minn. Stat. § 197.46.

5. That the City is a political subdivision subject to the requirements of Minn. Stat. § 197.46.

6. That Petitioner was removed from his position with the City without due notice of charges in writing and a hearing showing incompetency or misconduct.

7. That the City has not met its burden of proving by a preponderance of the evidence, its defense that Petitioner's position was eliminated in good faith for budgetary reasons.

8. That the City allowed at least one non-veteran with less seniority than Petitioner to continue to perform work which Petitioner could have and would have performed -- at substantially less cost to the City -- if he had not been removed.

9. That these actions have violated Petitioner's veterans preference rights pursuant to Minn. Stat. § 197.46.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Veteran's Affairs issue an order requiring the City of Princeton to:

(1) Reinstate Petitioner to his position as a part-time permanent police officer with the City;

(2) Award him back pay of $300.00 per month retroactive to December 1, 1993, with simple interest at 6%, subject to deductions for any unemployment compensation and earnings from other part-time employment Petitioner may have received since December 1, 1993; and

(3) Restore any sick leave, vacation pay and other benefits that would have accumulated if he had continued to be actively employed as a police officer since December 1, 1993.

Dated this _____ day of _____ 1997.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

Reported: Tape Recorded, not transcribed

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Every state in the Union has some form of veterans preference law. Koelfgen v. Jackson, 355 F.Supp. 243 (D.C. Minn. 1972), aff'd 93 S. Ct. 1502 (1973). Minnesota has had such a law in one form or another since the civil war. They are a legislative judgment that veterans are more likely to possess "courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office or employment." Kangas v. McDonald, 188 Minn. 157 at 161, 246 N.W. 900 at 901 (1933). It is thought that these qualities are difficult to measure objectively, but deserving of consideration in hiring. As the court in Kangas noted, they are also a reward for the sacrifices of these veterans:

> It has been the laudable purpose of the Minnesota lawmakers declared on numerous occasions, to give a well-earned preference in appointments in the public service to those who have served the nation in its time of peril.

These laws also recognize that service in the armed forces in times of war disrupts the lives of those who serve, endeavoring to remedy this disruption by giving them some advantage in public employment when they return. Feinerman v. Jones, 356 F.Supp. 252 (D.C. Pa. 1973). Veterans preference laws are thus, generally held to be remedial statutes which are to be liberally construed to accomplish their legislative purpose. Krohn v. Judicial Magistrate Appointing Commission, 239 N.W.2d 562 (Iowa 1976); Abt v. Wilcox, 106 Mich 183, 249 N.W. 483 (Mich. 1933); and Chester v. Department of Public Service, 216 A.2d 611 (N.J. Super. A.D. 1966).

The law has also afforded veterans employed by state or local government protection from unwarranted removal from their positions. The current Veterans Preference Act in Minnesota provides, in part:

> Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.
>
> Any veteran who has been notified of the intent to discharge him from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of his right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of his right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.
>
> Request for a hearing concerning such a discharge shall be made in writing and submitted by mail or personal service to the employment office of the concerned employer or other appropriate office or person.

Minn. Stat. § 197.46.

Petitioner's Veterans Preference Act rights clearly have been violated here because the City effectively terminated his employment in November 1993, without notifying him of his rights under the Veterans Preference Act. The City maintains that it was not required to give notice of his rights under the Act because it did not terminate him for cause, but instead laid him off as part of its effort to increase its flexibility and expand its coverage potential within a growing community, relying in part on the

Minnesota Supreme Court's decision in State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923).

In Boyd, the Minnesota Supreme Court recognized that the Veterans Preference Act expressly provides that veterans covered under the Act can only be removed from positions of public employment only for reasons of "incompetency" or "misconduct". However, the court also held that the Act is not intended to prevent public employers from abolishing those positions altogether in good faith, stating:

> The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, **if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position.** The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran's preference act.

Id. at 141-42, 193 N.W. at 32 (citations omitted) (emphasis supplied).

Although, in light of Boyd, public employers may abolish positions "notwithstanding" the Veterans Preference Act, the Minnesota Supreme Court has recognized in numerous cases following Boyd that the Act, including all the rights afforded thereunder, will apply if the abolition of the office was not in good faith. See, e.g., Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986). (Reassignment of duties by public employer to less senior, nonveteran employees in the guise of abolishing position of senior, veteran employee constituted bad faith; discharged employee was entitled to reinstatement and back pay under Veterans Preference Act).

Indeed, the Minnesota Supreme Court cited numerous previous instances in which the Court refused to accept a municipality's explanation that its challenged action did not fall within the Veteran Preference Act's proscriptions because all the municipality allegedly had done was abolish the position held by the veteran in good faith for some legitimate purpose; not as a mere subterfuge to oust the veteran from his position. For example, in State ex rel. Tamminen v. City of Eveleth, 189 Minn. 229, 234, N.W. 184, 196 (1933), the court stated flatly: "The law does not countenance the ousting of a soldier from an office by abolishing the name of the office just to get rid of a soldier." Similarly, in State ex rel. Niemi v. Thomas, 223 Minn. 435, 438-39, 27 N.W.2d 155, 158 (1947), the Court stated:

> Of course, the village council could not, under the pretext of abolishing the position, continue it under some other name. There would have to be a real, not a sham or pretended, abolishment. Where the abolishment of an

> office or position has been held to be a sham and pretended, it generally has appeared that there was prompt re-creation of the office or position under a different name or assignment of the work thereof to another department, followed by appointment or a new appointee to perform the work formerly done by the incumbent of the office or position claimed to have been abolished.

Finally, in State ex rel. Caffrey v. Metropolitan Airports Commission, 310 Minn. 480, 488, 246 N.W.2d 637, 642 (1976), the Court stated: "Absent a good faith abolition of petitioner's office, [the municipality] is not excused from providing him his VPL [Veterans Preference Law] rights."

In light of this case law, public employers have only three grounds on which to base termination of a veteran. The act allows a termination for "incompetency" or "misconduct" and Boyd permits a public employer to, **in good faith**, abolish a position held by a veteran. The Act specifically requires a public employer removing a veteran from employment to provide written notice of his or her veterans preference rights. This requirement is applicable to cases in which a public employer claims it is abolishing a position of employment held by a veteran but doesn't actually eliminate the duties, for the Minnesota Supreme Court has consistently held that a veteran is entitled to reinstatement to his or her former position with back pay when it is established, after a hearing, that the public employer, under the pretext of abolishing a veteran's position, actually continued it under some other name or reassigned the veteran's duties to some other employee. See Caffrey, 310 Minn. at 488, 246 N.W.2d at 642-42; Niemi, 223 Minn. at 438-39, 27 N.W.2d 155, 156-58; State ex rel. Evens v. City of Duluth, 195 Minn. 563, 566-67, 262 N.W. 681, 682 (1935); Tamminen, 189 Minn. at 234, 249 N.W.2d at 185-86. This is precisely the case presented on the facts at issue here.

Specifically, Respondent was required to notify Petitioner in writing , of his veterans preference rights in November, 1993 when it first called him in to tell him that he would not be receiving any more hours because the City had decided to go with only full-time (non-veteran) police officers, purportedly to increase its coverage potential and scheduling flexibility. It is undisputed that the employer in this case failed to provide the Petitioner with any written notice of termination of his employment or abolition of his position until February 23, 1996 -- more than 2 years hence. Under the Act, if no written notice is given to the veteran, his or her preference rights under the Act have been violated. That is what occurred here.

Furthermore, because the city merely reassigned Petitioner's duties to non-veteran employees less senior than he, his position was not abolished in good faith, and he is entitled to reinstatement with back pay. See, e.g., Young v. City of Duluth, 410 N.W.2d 27 (Minn. App. 1987). It is clear that the Veterans Preference Act is not applicable to cases in which public employers eliminate duties in times of revenue shortfalls and budget cuts. However, the City in this case readily admits it chose to reassign Petitioner's duties to non-veteran employees less senior than he was because it was expanding its police budget, conceding that the City of Princeton had both the revenues and the need to increase its police coverage. No exception in the Act exists for such situations.

Thus Petitioner should legally have had a preference over non-veteran employees less senior than he to continue to perform duties for which he was qualified, particularly given that the public employer in this case continued to need such duties performed, admitted during the hearing that Petitioner's position had not been eliminated for budgetary reasons, and acknowledged that the "position" of part-time police officer apparently is still a classified position within the overall structure of Princeton's police department although no part-time officers currently are employed there.

Petitioner was arguably constructively removed from Respondent's employ prior to November of 1993, when the Chief attempted to make his working conditions intolerable, in an effort to induce Petitioner to resign. See, Wangen v. Rochester (Minn. App., C2-96-1617, January 28, 1997). However, it is unnecessary to reach that question, because the petition does not seek damages for that period. The evidence suggests that the Chief decided in 1993 that the effort to encourage Petitioner to resign of his own accord was not working, leading the Chief to verbally terminate Petitioner's employment himself, in November of that year. While Respondent argues variously that Petitioner was merely "laid off" and "kept on the books" or that only the city council could legally fire anyone; there is no doubt that Petitioner was "de facto," explicitly, in reality removed from employment in November of 1993 when the Chief stopped scheduling him for work.

No case has been cited or uncovered in somewhat extensive research, in this or any other jurisdiction, approving abolition of a veteran's part-time job to give the hours to a less senior non-veteran. Although the Respondent contends that it did so in this case for reasons of economy and efficiency, the evidence indicates overwhelmingly that elimination of the position was the opposite of economical and did not "increase coverage" or improve efficiency.

In sum, Petitioner pleaded in vain for documentation advising him of his status in late 1993, reasonably believing he remained on the employee roster, consequently refusing overtime work opportunities at his full time job due to his desire to continue to serve the City as he had done for eight years. He was finally told in February of 1996 that his job would be eliminated in favor of non-veteran employees to "increase coverage". The City has not met its burden of establishing by a preponderance of the evidence that Petitioner's position was eliminated in good faith solely for budgetary reasons. Absent such a showing, Petitioner is entitled to reinstatement and back wages.

HLK